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No. 98-7540 (14)

In The United States Supreme Court
October Term, 1998

Supreme Court, U. S.
FILED

MAY 20 1999

CLERK

Scott Leslie Carmell, Petitioner

v.

State of Texas, Respondent

On Petition For Writ of Certiorari
To The Court of Appeals for the Second District
of Texas

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SUPREME COURT, U.S.

Petitioner's First Reply Brief
to Respondent's Brief In Opposition

To The Honorable Justices Of The Supreme Court:
Now Comes Scott Carmell, Petitioner Prose, and files
this First Reply Brief to Respondent's Brief in Opposition.

Reasons For Granting The Writ

I. The Questions Presented For Review Are Worthy
Of The Court's Attention.

Petitioner, Scott Carmell, presented to this Court
important issues of law in his Petition For Writ of
Certiorari. These unresolved issue, and questions
resulting therefrom, have merit so as to warrant
the Court's exercise of its certiorari jurisdiction.

11 pp

II. Does The Application Of The Amended Version Of Article 38.07 Of The Texas Code Of Criminal Procedure To An Alleged Offense Dated Prior To The Amendment Violate The Ex Post Facto Clause?

Article I, Section 10 of the U.S. Constitution forbids the states from passing ex post facto laws. The amended application of TxCCP §38.07 to the conviction in question goes beyond merely adversely affecting the Petitioner as the state incorrectly said. The law in effect at the time of the alleged offense would have resulted in acquittal had it been applied at the time of trial. However, the state used an amended version which stripped Mr. Carmell from an acquittal.

The state asked this Court to deny the Petition For Writ of Certiorari on this issue while incorrectly saying no deprivation of an affirmative defense occurred. However, "Every law that alters legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender" is an Ex Post Facto violation. (Collins v. Youngblood, 110 S.Ct. 2715 (1990) at 2719; quoting Calder v. Bull, 3 Dall. 386, 390-392, 1 L.Ed. 648 (1798)). This has never been denied by this Court.

Procedural changes, as in Tx C.C.P. §38.07, may constitute an Ex Post Facto Clause violation if it affects matters of substance by depriving a defendant of substantial protections with which the existing law surrounds the person accused of a crime. (Id. 2720) The change in §38.07 not only affected procedure but also changed evidence required

for a conviction — requiring less than at the time of the alleged offense. This clearly violates ex post facto.

Texas Code of Criminal Procedure, Article 12 (Limitations) limits the state to prosecuting a defendant to a certain statutory procedural time period. The state is barred from prosecution beyond that time period. One charged with a crime after the limitation period can use TxCCP article 12 as an affirmative defense to prosecution and prevent conviction.

Likewise, article 38.07 limited the alleged victim in this case to a statutory limitation period of six months for making an outcry which was required for uncorroborated testimony leading to a conviction. Acquittal was mandatory under the law at the time of the alleged offense since there was no outcry within that time period and the testimony was uncorroborated. Just as Tx.C.C.P. article 12 bars conviction so does the previous version of §38.07 after a statutorily designated time period. Changing either one and applying it retroactively after the time period expired is clearly an Ex Post Facto Clause violation.

Additionally, the effective date of the amended version of §38.07 used at trial was September 1, 1993. This was applied to a June 1, 1992 offense date. However, the legislature did not authorize a retroactive application to alleged offenses prior to September 1, 1993. Such authorization would have been an ex post facto violation — which was never intended by the legislature.

Ex Post Facto applies to some procedural changes if it deprives a defendant of a defense. (Id. 2725-2726) In this case the retroactive application of the 1993 §38.07 version involved a change from acquittal to a twenty-year sentence. What would have been conclusive

statutory evidence mandating acquittal. The alleged offense was committed was not received as evidence under the new law. The retroactive application of the amended 38.07 materially impaired Mr. Carmell's right to have the question of his guilt/innocence determined according to the law as it was when the alleged offense occurred (Id. 2720)

Ex Post Facto was intended to secure substantial personal rights against oppressive legislation. (Id. 2727) To strip an accused of a procedural bar to conviction (ie. expiration of limitations, expiration of outcry) that existed at the time of the alleged offense is oppressive and an Ex Post Facto violation. Thus, a procedural protection is substantial when viewed from the commission of the offense, if it affects the modes of procedure by which a valid conviction or sentence may be imposed. (Id. 2727)

The Petitioner, Mr. Carmell, was not afforded all the procedural and substantive protections guaranteed by Texas law and the U.S. Constitution, Amendment XIV, at the time of the offense due to infecting the jury with new procedures not yet devised at the time of the alleged offense. In addition, the Texas Second Court of Appeals ruled against Mr. Carmell contrary to the decision of another court that entered acquittals in similar situations. (Bowers v. State, 914 SW.2d 213, 217 (Tex. App. - El Paso 1996)) Therefore, the exercise of this Court's jurisdiction is needed to resolve the Texas court's conflict and secure Mr. Carmell's U.S. Constitutional Protections.

III. Are The Petitioner's Sixth and Fourteenth Amendment Claims Properly Before The Court?

The Petitioner's Constitutional right of confrontation (U.S.C., Amend. 6) was violated by the prosecutor intentionally withholding evidence that was favorable to the accused.

This claim was properly presented to the court below.

This issue is not being raised for the first on a Petition For Writ of Certiorari as the state claimed. To set the record straight, Mr. Carmell's attorney of record, William Street, presented to the state court of appeals the prosecutor's failure to disclose material impeachment evidence. This was presented as a violation of the Fourteenth Amendment Due Process Clause. This Due Process Clause violation was then further defined by Mr. Carmell, pro se litigant, to more specifically expose the violation of his right to confrontation. It was impossible to confront what was withheld in violation of the Fourteenth Amendment.

Beyond that, the state falsely claims "... Carmell's Petition For Writ of Certiorari is silent as to ... the Due Process Clause ..." (Response brief, p. 10) However, page 7 of the Petition clearly refers to the Fourteenth Amendment. Thus, the Fourteenth Amendment due process violation presented to the lower court is presented here.

The prosecutor knew the state's case would be weakened, if not destroyed, by providing the defense team impeaching evidence. Therefore, the prosecutor saw fit to lie more than once, until it was too late to present the facts to the jury, in violation of Mr. Carmell's Constitutional protections.

The state alleged Eleanor's baby was conceived after the petitioner's arrest. No proof was presented to support this. Also, the state skirted Eleanor's bias, motive, lack of honesty and integrity. Why? Because credibility and honesty of the witness and the state are in question. Therefore, there is a reasonable probability that presenting these matters to a jury would result in a different outcome.

The state also alleged this issue has not reached

state exhaustion. However, this issue was presented to the Texas Court of Criminal Appeals in the Petition For Discretionary Review (PDR). The refusal of the Texas Court of Criminal Appeals to rule on the PDR is not a ruling on the merits of the case. In addition, the lower courts refusal to hear the PDR is not a "procedural bar" to this Court's jurisdiction. In refusing to rule on the merits of the PDR, when given the opportunity, the state court waived "exhaustion."

The Petition For Writ of Certiorari, a continuation of the argument before the Texas court of appeals, that received no ruling on merits by the Texas Court of Criminal Appeals, presents both Sixth and Fourteenth Amendment violations to this Court. Therefore, the review powers of this Court are called upon to protect Mr. Carmell's Constitutional rights.

The state wished to confuse the issue. However, the simple issue is as follows: The prosecutor withheld evidence favorable to the accused in violation of the Due Process Clause of the Fourteenth Amendment resulting in a violation of the Petitioner's confrontation rights under the Sixth Amendment. Therefore, this Court is asked to exercise its jurisdiction in this matter.

IV. Is An Insufficiency Claim In Violation of The Fifth and Fourteenth Amendments Worthy Of Certiorari Review?

A claim of insufficiency, raised in the lower court previously, is a Federal Constitutional claim - as the state concedes. In this case, the state misconstrued evidence to include things beyond the bounds of state

law.

The Petitioner does not have to prove he did not engage in the conduct in question as the state asserted to confuse the issue. (Respondent's brief, p. 14) The matter at hand currently is whether the state impermissibly expanded statutory law.

The statute in question (Tex.P.C. 22.021) specifies contact with the "genitals" - not the "area" or "hair." "Genital area" and "pubic hair" simply are not equivalent to "genital."

If "area" and "hair" were synonymous with "genital" an indictment could read: "Caused contact with the genital area (or pubic hair)." However, if Petitioner had been so indicted the indictment would have been quashed for failure to track statutory language.

Such an indictment would be creating a new crime not authorized by the legislature. Yet, the lower court did exactly that in their ruling. This is nothing less than creating a new offense for an alleged antecedent event.

A person combs or brushes his hair - not his head. The hair even grows on the neck. "Hair" and "head" are two different things. Likewise, "pubic hair" - which grows above the pubic bone, inside the thighs, etc. - and "genital" are two different things.

Beyond that, many people live in the Washington, D.C. "area" but reside outside of Washington, D.C. - some many miles out. Similarly, the "genital area" lies outside and around the "genitals." Therefore, a massage

therapist or doctor could work on a client/patient in the "genital area" and never have genital contact. Also, a female may shave in the "genital area" - inner thighs, lower abdomen and pubic bone - before putting on a bathing suit and stay clear of her genitals.

Since "genital area" and "pubic hair" involve anatomy other than the genitals, the alleged victim's testimony went outside the bounds of state law and was therefore insufficient.

The state attempted to minimize this matter by stating the Federal Circuit Court does "not police every minutiae in state criminal procedural activity. (Respondent's brief, p.14) However, insufficiency of evidence goes beyond mere "minutiae (of) procedural activity" to the very substance of a conviction. Therefore, a meaningful Federal Court claim is presented to this Court for its review to ensure Mr. Carmell of his Constitutional protections under the Fifth and Fourteenth Amendments.

Conclusion

Due to insufficiency of evidence, violations of the Fifth, Sixth and Fourteenth Amendment protections, and violation of U.S.C. art. I, sec. 10 Ex Post Facto Clause, the conviction should be reversed.

Prayer

The Petitioner respectfully prays this Court to grant this Petition For Writ Of Certiorari.

Respectfully submitted,

Scott Leslie Carmell,

Pro se

Date: May 14, 1999

Scott Leslie Carmell

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No. 98-7540

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OCTOBER TERM 1998

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On Petition for Writ of Certiorari
To the Court of Appeals for the
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PROOF OF SERVICE

I hereby certify that on the 14th day of May, 1999,
one copy of Petitioner's First Reply Brief to Respondent's
Brief In Opposition was mailed, postage paid to
Charles A. Palmer, Assistant Attorney General, P.O. Box
12548, Capitol Station, Austin, Texas 78711. All
parties required to be served have been served.

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Krose

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May 14, 1999

Honorable William K. Sutter, Clerk
United States Supreme Court
1 First Street N.E.
Washington, D.C. 20543-0001

Re: Scott Leslie Carmell v State of Texas
No. 98-7540

Dear Mr. Sutter:

Enclosed for filing is the Petitioner's First Reply Brief.
Also enclosed is the Proof of Service form.

Please indicate the date of filing on the enclosed copy
of this letter and return it to me in the enclosed

self-addressed stamped envelope.

Opposing counsel has been served.
Thank you for your assistance.

Sincerely,

Scott L. Carmell

Scott L. Carmell

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